

Municipal Incorporation and Territorial Changes in Ohio

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This is primarily an expository paper. It is presented as one step in what the authors hope will be a thorough re-examination of the subject in Ohio leading to such statutory changes as may be required to articulate well-considered policy judgments. The Committee on Local Government Law of the Ohio State Bar Association is actively concerned with the subject. The members will perform a substantial public service if they will carry through the primary study and express their recommendations in a proposed statute.

That the time has come for this study will appear more clearly to the reader after he has considered the analysis of present law, which follows. To the writers it is astounding that the governing legislation is so largely devoid of policy content and that it has undergone so little modification over a long period marked by tremendous urban development.

INCORPORATION

Prior to the constitution of 1851 the General Assembly was free to incorporate a municipality by special act.¹ Section 1 of Article XIII of that constitution forbade the legislature to pass any special act conferring corporate powers. This applies to municipal, as well as private corporations.² Conceivably, this could be said to have left the legislature with authority to set up the bare bones of a municipal government by special act and provide therein that the municipality should have such powers as might be conferred by general law. That, however, is strictly academic today because it is clear from the language

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¹ For a discussion of pre-1851 law and practice see Walker, *Municipal Government in Ohio before 1912*, 9 OHIO ST. L.J. 1 (1948).

² Township of Northfield v. Macedonia, 22 O.C.C. (N.S.) 50, 33 O.C.D. 445 (1907).

of the Home Rule Amendment of 1912 that incorporation of municipalities must be provided for by general law.³

It has previously been pointed out in the pages of this Journal that an Ohio municipality cannot be organized in the first instance under a home rule charter.⁴ The constitution confers home rule powers upon municipalities. Charter-making is a home rule power. There is no entity or public agency to enjoy home rule powers until incorporation proceedings have been completed under general law.

Under the constitutional classification by population, municipalities of less than 5,000 are villages; those of 5,000 or over are cities. The governing statute, however, does not make provision for original incorporation as a city of any community of 5,000 or more. The statute is concerned with incorporation of villages. Thus, under the statutes dealing with changes in classification, the oversized village must await the next federal census to achieve recognition as a city.

So long as it acts through general legislation the General Assembly has a free hand in formulating policy as to municipal incorporation. There are no other express constitutional limitations. Even so, the fact that constitutional home rule powers are devolved directly upon all municipalities has an important bearing upon the shaping of policy as to incorporation. In Texas it has been held that a home rule municipality is indestructable by the legislature without its consent.⁵ The very question is presently being litigated in Ohio.⁶ Were the Ohio courts to reach the same conclusion, it would be plain enough to the writers that extreme care and foresight should be exercised in providing for the incorporation of indestructable local units.

The Ohio Revised Code sets forth two procedures which may be followed to incorporate a village. One is initiated by a petition addressed to county commissioners;⁷ the other by a petition addressed to township trustees.⁸ The former dates from 1852;⁹ the latter was provided by a statute of 1896.¹⁰ In instances where more than one petition is filed with the commissioners or trustees precedence is determined by reference to the order of filing.¹¹

³ Section 2 of Article XVIII requires that general laws be passed to provide for the incorporation and government of cities and villages.

⁴ Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 27 (1948).

⁵ *City of Houston v. City of Magnolia Park*, 115 Tex. 101, 276 S.W. 685 (1925).

⁶ In a case involving annexation of a part of the Village of Middleburg Heights to the adjoining City of Berea without village consent under a statute which antedates the home rule amendment. The authors have an unofficial report that a ruling adverse to the village has been made at the court of appeals level.

⁷ OHIO REV. CODE § 707.02 *et seq.*

⁸ OHIO REV. CODE § 707.15 *et seq.*

⁹ 50 OHIO LAWS 223

¹⁰ 92 OHIO LAWS 333.

¹¹ *State ex rel. Osborn v. Mitchell*, 22, O.C.C. 208, 12 O.C.D. 288 (1901),

COUNTY COMMISSIONER METHOD

The inhabitants of any territory laid off in village lots, or the inhabitants of any territory which has been laid off in such lots and surveyed and platted by an engineer or surveyor, may, when the plat is properly recorded as is provided with respect to deeds, petition the county commissioners to incorporate.¹² Prior to 1869 it was not required that the area have been platted.¹³ It is still permissible to include unplatted land adjacent to the platted core.¹⁴ The petition must be signed by not less than thirty electors residing within the limits of the proposed corporation and be accompanied by an accurate map of the territory. There is an exception as to any village organized upon any island or islands. In such a case platting is not required and there is no minimum set for the number of petitioners.

Beyond the factor of platting there are scant substantive requirements to guide the county commissioners in their determination to grant or to deny an application for incorporation. Section 707.02 of the Revised Code provides that the commissioners shall, after determining that certain procedural requirements have been satisfied, order incorporation if the limits of the proposed village are not unreasonably large or small, if there is the requisite population and if "It is right that the prayer of the petition be granted."¹⁵ These are the only references to area and population. There are no definite minima; "requisite population" is not elsewhere defined. There is no stated guide for the commissioners as to "unreasonably large or small" areas. It can be said, of course, that the language used has to do with the adequacy and appropriateness of an area for organization as an urban-type unit of local government. From what perspective, however, is reasonableness to be regarded—that of the people in the area concerned, that of the state as a whole, that of the people in neighboring areas and overlapping units of government, or what?

There are questions as to what adjacent unplatted land may be included.¹⁶ In *Hall v. Siegrist, Recorder*,¹⁷ the court defined "adjacent" to mean lands lying near the center or nucleus of population so as to be somewhat suburban in character, and to have some community of interest with the platted area. There is no express requirement of compactness, but one may doubt that a configuration which left a no

¹² OHIO REV. CODE § 707.02.

¹³ This jurisdictional requirement was added by 66 OHIO LAWS 150.

¹⁴ OHIO REV. CODE § 707.04.

¹⁵ Prior to the 1953 revision the language was "if it seems to the Commissioners right that the prayer of the petition be granted." Query as to whether the revision narrows the discretion of the commissioners.

¹⁶ The statute tells us simply that the territory of a proposed municipality may contain "adjacent territory not laid off into lots."

¹⁷ 13 Ohio Dec. (N.P.) 46 (Com. Pleas 1902).

man's land within points of contact would pass muster. The statute takes no cognizance of the relation of governmental organization and administration to actual service areas. It does not exact that there be even a minimal economic base for urban organization and administration. It is oblivious to both horizontal and vertical intergovernmental relations—conspicuously in the metropolitan setting. Thus, it can be employed for the creation of a tight ring of peripheral municipalities around a primary city.¹⁸

PROCEDURE

The petition must contain: (1) an accurate description of the territory . . . ;¹⁹ (2) the supposed number of inhabitants residing therein; (3) the name proposed; and (4) the name of a person to act as agent for the petitioners, and more than one agent may be named therein. The petition must be accompanied by an accurate map of the territory.

It is required that the petition be presented to the commissioners at a "regular session." While a special meeting would not do, presentation at an adjournment or a regular meeting is proper.²⁰ The commissioners are to cause the petition to be filed in the county auditor's office and then fix and communicate to the petitioners' agent the time and place of the hearing, which must be more than sixty days after such filing. It has been decided that the jurisdiction of the county commissioners is continuing and, thus, that their rejection of a petition for annexation may be rescinded unless there is a withdrawal of enough signatures of the petitioners to render the petition ineffectual.²¹

Revised Code, Section 707.05 further requires the agent of the petitioners to cause a notice containing the substance of the petition, and the time and place it will be heard, to be published in a news-

¹⁸ This situation has been discussed in one common pleas case. The court declared that a primary city had no standing to enjoin incorporation of an area lying in the path of the city's anticipated expansion.

¹⁹ OHIO REV. CODE § 707.04

A petition does not contain an accurate description when the description is set out on the back of the petition and is merely referred to by the word "back" in the body of the petition. *Wells v. Brill, Recorder*, 9 Ohio N. P. (N.S.) 454 (Com. Pl. 1909).

A map and description taken from public records of a county suffice although they are not entirely accurate (greater distance between certain monuments than shown by records). *Turpin v. Hagerty, Recorder*, 12 Ohio Dec. (N. P.) 161 (Com. Pl. 1911); *aff'd without opinion*, 69 Ohio St. 534, 70 N.E. 1133 (1903).

²⁰ *Turpin v. Hagerty, supra* note 19.

²¹ *Pickelheimer v. Urner*, 29 Ohio N.P. (N.S.) 547 (Com. Pl. 1932); *aff'd* 45 Ohio App. 343, 187 N.E. 123 (1933) (the court of appeals apparently assumed that commissioner jurisprudence continued).

paper printed and of general circulation in the county for six consecutive weeks, and cause a copy of the notice to be posted in a conspicuous place within the limits of the proposed village not less than six weeks prior to the time fixed for the hearing. The cases have been most liberal in determining what is a newspaper of "general circulation."²² The number of paid subscribers appears to be of no importance.²³

The notice requirement is not very explicit. Presumably it calls for newspaper publication once a week for six consecutive weeks but it does not expressly so provide. Nor does it expressly ordain that first publication be made at least six full weeks (forty-two days) before the hearing, unless the reference at the end of the sentence to six weeks applies to newspaper publication as well as posting.

Section 707.06 provides for a public hearing or its adjournment, for interested parties to appear and for amendment of the petition. Any interested person may appear, in opposition, in person or by attorney. The commissioners must give consideration to affidavits filed pro and con. Nothing is said about oral testimony and argument. Doubtless, the commissioners could dispense with oral presentation entirely.

Amendment of a petition may be made at the hearing by leave of the commissioners. If territory is to be added by such an amendment, a new time must be fixed for the hearing and a new notice given.

We have the benefit of but limited judicial interpretation of "person interested." Does it include a corporation, private or public? Neighboring municipalities have been denied standing to sue.²⁴ A contrary conclusion has been reached as to a resident property owner of the remainder of a township whose property was two miles from the proposed municipality.²⁵ The distinction suggested is between a private civil interest and the governmental interest of a municipality.

With further reference to the amendment of a petition it seems safe to say that the petitioners as a body may amend. When, however, may their agent do so? The supreme court, in *Shugars v. Williams*,²⁶ allowed ratification of an agent's act of excluding certain territory

²² In *State ex rel. Sentinel Co. v. Commissioners of Wood County*, 14 C.C. (N.S.) 531, 23 C. D. 93 (1910); *aff'd* 84 Ohio St. 447, 95 N.E. 1157 (1911), the court, in a case concerning financial reports of county commissioners, said a newspaper was "of general circulation" which had a circulation of 800 in a county of 50,000 inhabitants, 35,000 of whom lived in fifteen townships in which the circulation was only 36.

See also *State ex rel. Ellis v. Urner*, Auditor, 127 Ohio St. 84, 186 N.E. 706 (1933); *Bising v. City of Cincinnati*, 126 Ohio St. 218, 184 N.E. 837 (1933).

²³ *State ex rel. Dayton-Oakwood Press, Inc. v. Herman*, 70 Ohio App. 103, 42 N.E. 2d 703 (1942); *Ambos v. Campbell*, 40 Ohio App. 346, 178 N.E. 320 (1931).

²⁴ *City of Lockland v. Shaver*, 98 N.E. 2d 643 (Ohio Com. Pl. 1950).

²⁵ *Hall v. Siegrist*, Recorder, 13 Ohio Dec. 46 (Com. Pl. 1902).

²⁶ *Shugars, Clerk v. Williams*, 50 Ohio St. 297, 34 N.E. 248 (1893).

described in the petition. In another case, attack upon an agent's action in drawing in an omitted course in the map attached to the petition failed.²⁷ *Pickelhemer v. Urner*²⁸ involved an annexation proceeding in which an effort was made by petitioners' agent to eliminate territory from the area described in the application. There had not been ratification. The court considered his action unauthorized and upheld an injunction against the further prosecution of the proceedings. Doubtless, an agent may make formal amendments by way of correcting or perfecting a petition but it is not likely that an amendment by him which went to the substance and was made without special authority would stand up. Since, as we have seen, a new hearing is required where the commissioners permit an amendment adding territory, further proceedings without a new hearing would be subject to a jurisdictional defect.²⁹

TOWNSHIP TRUSTEE METHOD

The second manner of incorporation relates, in terms, to the incorporation of "any territory or portion thereof" into a village. It is initiated by application to township trustees.³⁰ The petition, accompanied by an accurate map, must be signed by at least thirty electors, a majority of whom must be freeholders, and must request the holding of an election to obtain the "sense" of the electors on incorporation. The petition must contain, in addition, the matter required by statute for petitions to "incorporate territory laid off into village lots." This procedure patently differs from the county commissioner method; it calls for an election, and it is required that a majority of the petitioners be freeholders. Nor is there any provision for amendment of a petition.³¹

In 1947 the Supreme Court, by a five-to-two vote, decided that this method was cumulative and thus, applied to platted as well as unplatted areas.³² The problem of interpretations was one of some difficulty, although the majority did not concede the existence of any ambiguity in view of the absence of language qualifying the words "any territory or portion thereof." The dissenters did not find these words clear, when read with the enacting clause, which described the measure as supplemental, and with the clause borrowing in part the

²⁷ *Pollack v. Toland*, 1 Ohio C.C. (N.S.) 315, 15 Ohio C. D. 75 (1903).

²⁸ 29 Ohio N.P. (N.S.) 547 (Com. Pl. 1932); *aff'd* 45 Ohio App. 343, 187 N.E. 123 (1933).

²⁹ OHIO REV. CODE § 707.06.

³⁰ OHIO REV. CODE § 707.15.

³¹ This procedure does not involve a hearing and, as will be seen, the statute calls for but brief notice of the election after trustee action on a petition.

³² *Wachendorf v. Shaver*, Recorder, 149 Ohio St. 231, 78 N.E. 2d 370 (1948).

procedure applicable to platted areas. This opened for them the pages of legislative history. There they learned that county commissioner jurisdiction had, prior to 1869, extended to applications relating to platted or unplatted land, that in 1869 the commissioner method was confined to areas with platted land at the core and that in 1896 the supplemental measure providing the township trustee method was enacted.

The desirability of cumulating methods, neither of which has much policy content, is not evident. Whatever the merits of the argument on the legal question, the statute practically shouts for overhauling.

The petition may be presented to the trustees at a "regular or special session."³³ Upon proof that the petitioners are electors (a majority of whom are freeholders) residing within the area to be incorporated the trustees "shall" order an election to be held.³⁴ The election must be held within fifteen days and the board of elections must give ten days notice by publication in a newspaper of general circulation and by posting notice in three or more public places in the proposed village.³⁵ If a majority of the electors favor incorporation the trustees "shall then declare that such territory . . . be deemed an incorporated village," and cause a record to be made with the county recorder.³⁶

This method lacks the meagre substantive requirements of the county commissioner procedure. It is applicable to unplatted land. As a matter of fact, it was as we have already noted, not until recent Supreme Court interpretation, that the method was finally determined to be cumulative and, thus, available as to either platted or unplatted land that it was recognized as anything more than a supplemental device confined to unplatted land.³⁷

The township trustees have no authority to determine whether the area is unreasonably large or small, whether there is the requisite population (whatever that may be) and whether it is right that the prayer be granted.³⁸ Once they find that certain procedural require-

³³ OHIO REV. CODE § 707.15.

³⁴ OHIO REV. CODE § 707.16.

³⁵ *Id.* This is very skimpy notice. It permits use of the trustee method in haste while an opponent of proposed incorporation is temporarily absent.

³⁶ OHIO REV. CODE § 707.18 and 707.19.

³⁷ Prior to *Wachendorf v. Shaver*, Recorder, *supra*, note 32, the lower courts had been split on the question. In accord with that Wachendorfer view: *Libby v. Paul*, 17 Ohio N.P. (N.S.) 433 (Com. Pl. 1915); *Hall v. Siegrist*, Recorder, 13 Ohio Dec. (N.P.) 46 (Com. Pl. 1902). *Contra*: *Schorr and Matzer v. Braun*, 4 Ohio N.P. (N.S.) 561, 17 Ohio Dec. (N.P.) 478 (Com. Pl. 1906), *aff'd by circuit court* (unreported).

³⁸ *Wachendorf v. Kearns*, Recorder, 33 Ohio Op. 458, 69 N.E. 2d 640 (Com. Pl. 1946); overruled by *Wachendorf v. Shaver* 149 Ohio St. 231, 78 N.E. 2d 370 (1948), on another ground.

ments have been met, they have no choice but to order an election.³⁹

In short, there is practically a policy vacuum apart from the policy of leaving the entire matter to local decision. It is not suggested, however, that the statute is open to effective attack as an improper delegation of legislative power. The Ohio courts are committed to a very liberal outlook on delegation questions,⁴⁰ and a delegation to the voters is less vulnerable, in any event, than one to administrative hands.

Lawrence v. Mitchell,⁴¹ was a suit to enjoin the holding of an election under Revised Code, Section 707.15. The proceeding was considered premature; Section 707.20 sets up a later time for judicial review. The court relied also on the proposition that the power to hold an election is political and not subject to judicial review. A court is not free, of course, to prevent the conducting of an election which has been properly called, or to interfere with the decision of the electors. If there are legal defects in the calling of an election that is another matter. Thus, if the trustees act without jurisdiction, to hold the election would be to make an illegal expenditure of public funds. In a recent court of appeals case,⁴² the court laid it down that a writ of prohibition may be had by a taxpayer to prevent the board of elections from conducting the election provided for in Section 707.15 where it appears that the action of the trustees is illegal.⁴³ No mention was made of the *Lawrence* case.

Mandamus will lie to force the trustees to hold an election. It is elementary, however, that mandamus is an extraordinary remedy and will be granted only when a clear, legal right exists. The Supreme Court, in *The State ex rel. Lantz v. The Board of Trustees*,⁴⁴ determined that no clear, legal right existed where the map attached to the petition for incorporation and the area described in the petition did not coincide.

The statute does not speak to the problem which would arise were territory proposed to be incorporated so situated as to straddle the line between two counties. Perhaps the subject is largely academic,

³⁹ The trustees are not required, however, to act immediately; they have a reasonable time to attend to business on hand. *State ex rel. Harms v. Trustees of Euclid Township*, 19 Ohio C. C. 742, 9 Ohio C. D. 849 (1899).

⁴⁰ See, for example *State ex rel. Bryant v. Akron Metropolitan Park District for Summit County*, 120 Ohio St. 464, 166 N.E. 407 (1929).

⁴¹ 8 Ohio N.P. 8, 10 Ohio Dec. (N.P.) 265 (Com. Pl. 1900); overruled by *State ex rel. Osborn v. Mitchell*, 22 Ohio C.C. 208, 12 Ohio C. D. 288 (1901), on other grounds.

⁴² *State ex rel. Young v. Board of Elections of Lucas County*, 81 Ohio App. 209, 78 N.E. 2d 761 (1947).

⁴³ The court relied upon two Supreme Court decisions supporting the availability of prohibition to proven boards of election from placing on ballots names which legally should not appear on them. *State ex rel. Smith v. Hummel Secretary of State*, 146 Ohio St. 341, 66 N.E. 2d 111 (1946); *State ex rel. Stanley v. Bernon*, 127 Ohio St. 204, 187 N.E. 733 (1933).

⁴⁴ 147 Ohio St. 256, 70 N.E. 2d 890 (1946).

but there is nothing in Ohio's constitutional framework to preclude a municipality overlapping parts of two or more counties.

JUDICIAL REVIEW

Section 707.20 and Sections 707.11 to 707.14, inclusive, provide for judicial review of incorporation proceedings under either method. One of the last steps under each method is the filing of a certified transcript of the proceedings with the county recorder who, at the end of a stated period and unless enjoined, records it in the proper book of records,⁴⁵ and files a copy with the Secretary of State. The scheme of judicial review under the statute is to make available during the stated period, the remedy of injunction against the making of the record and certification of the transcript by the recorder.

Section 707.11 provides: "within sixty days from the filing of the papers by the county commissioners with the recorder, any person interested may make application to the court of common pleas, or if during vacation, to a judge thereof, setting forth the errors complained of, or the inaccuracy of the boundaries, or that the limits of the proposed corporation are unreasonably large or small or that it is not right just or equitable that the prayer of the petition presented to the board of commissioners be granted . . ." and praying for an injunction restraining the recorder from making the record and certifying the transcript. Section 707.20 provides: ". . . but no injunction shall be brought, as herein provided in case of filing the transcript with the county commissioners, unless the action be instituted within ten days from the filing of the papers by the trustees with the county recorder, *but the right of petition to the court of common pleas for error shall exist as provided in the following sections of this chapter.*" (Italics added).

The italicized clause poses an interesting problem. One plausible interpretation is that injunction may only be brought within ten days for matters of substance,⁴⁶ but may be brought within sixty days for procedural errors.⁴⁷ A more logical approach is to say that this clause merely means the procedure before the court of common pleas as is set forth in Section 707.11 and following, is to be pursued but the action must be instituted within ten days.⁴⁸

⁴⁵ As to what is a proper book of records, see 1943 Opn. Atty. Gen. (Ohio) No. 6523.

⁴⁶ That is, that the limits of the proposed corporation are unreasonably large or small, and so on.

⁴⁷ That is, that there are inaccuracies in description or other errors in the process of incorporation.

⁴⁸ We understand that this is what has been done. There are, however, no decisions in point.

The review by the common pleas court is not considered an exercise of a legislative function by the court but is deemed a judicial review of a non-judicial act.⁴⁹ We have no difficulty with judicial review of legislative action by reference to legal limitations on legislative power but Section 707.11 might be so read as to allow the common pleas court wholly to re-determine the merits and expediency of incorporation. Judicial review in this sphere should be limited to determining if the commissioners' or trustees' action is arbitrary or discriminatory.⁵⁰ This is particularly true when it is remembered the courts have expressly stated that the commissioners and trustees act under these sections in a legislative, not a judicial, capacity.⁵¹

If the trustees or commissioners refuse incorporation a different problem exists. Should the courts undertake to force the legislative branch to take particular affirmative action where there is any range for discretion? Further, as a matter of statutory construction, Section 707.11 expressly refers only to actions to restrain the granting of the petition.

The judgment of the common pleas court may be appealed on questions of law to the court of appeals.⁵² It has not, however, been affirmatively decided by the Supreme Court whether there may be an appeal on questions of law and fact.⁵³ In *Wachendorf v. Shaver*,⁵⁴ the Supreme Court recognized this question but did not rule upon it as it was stated in the lower court by counsel that the question would not be pressed. One court of appeals has determined that it had no jurisdiction to hear an appeal on questions of law and fact in a proceeding under Section 707.11 as it is not a chancery case; the court considered the injunction provided in Section 707.11 as simply an ancillary remedy to enforce the order of the court.⁵⁵ The question should be examined in historical perspective. The predecessor statute was enacted in 1869, which was after the adoption of the code of civil procedure. Since this proceeding was unknown to chancery courts before the adoption of the code it appears that the cited court of appeals decision was correct.

Who is a proper party plaintiff under Section 707.11? The proceeding may be instituted by "any person interested." In a common

⁴⁹ *Geauga Improvement Ass'n. v. Lozier*, 125 Ohio St. 565, 182 N.E. 489 (1932).

⁵⁰ It is the local political body upon whom the law has placed the basic responsibility; the appropriate function of a reviewing court is to determine whether there have been irregularities in procedure or abuse of power.

⁵¹ *Blanchard v. Bissell*, 11 Ohio St. 96 (1860) (an annexation case in which the relevant procedure as to incorporation was "borrowed").

⁵² *Geauga Improvement Ass'n v. Lozier*, *supra*, note 49.

⁵³ The courts of appeals have jurisdiction to hear appeals on the law and facts in chancery cases only. *Youngstown Municipal Ry. Co. v. City of Youngstown*, 147 Ohio St. 221, 70 N.E. 2d 649 (1946).

⁵⁴ 149 Ohio St. 231, 78 N.E. 2d 370 (1948).

⁵⁵ *Sackett v. Irish*, 11 Ohio App. 403 (1918).

pleas case, decided in 1902, it was determined that a person who owned a farm two miles from the limits of a proposed hamlet and resided at least two miles from those limits was an "interested person."⁵⁶ He would be "affected" by the incorporation in that his taxes would be increased.

In a recent case the proceeding was instituted by two cities and a village, which alleged that the incorporation would prevent the available contiguous area for growth of those units. Relief was denied.⁵⁷ There is an interpretation section in the Municipal Corporations Title of the Revised Code (707.01) which reads, in part: . . . the word . . . 'person' includes a private corporation." The court invoked *expressio unius est exclusio alterius* to support the conclusion that a municipality was not a "person" under Section 707.11. Nor had the plaintiffs, in the courts opinion, asserted the requisite interest, since they did not rely upon any legal title, right, or interest of a resident of the territory or of a resident of the remainder of the township, who would be adversely affected by incorporation. This is not very clear; it does not tell us what the difference between a legal interest and an economic interest might be.

When a petition for injunction is filed the plaintiff must serve notice of it in writing upon the agent of the petitioners for incorporation and upon the county recorder. It is not required that copies be served. The recorder, on receipt of the notice, must transmit to the clerk of the court in which the matter is pending, all papers relating to the proposed incorporation on file in his office.⁵⁸

The petition for injunction must be filed with the court or judge personally and not with the clerk.⁵⁹ Under Section 707.13 the judge has the petition filed in the office of the clerk of the courts. He must conduct a hearing on the petition not less than twenty days after it is filed. At the hearing he may hear evidence upon the matters and things averred in the petition.

In an old annexation case, decided under a statute similar to the present statutes relating to incorporation, the Supreme Court said relief must be directly sought as provided in the code, (Section 707.11) and not collaterally.⁶⁰ This was doubtless correct if the court meant that there can be no collateral attack where the commissioners (or trustees) act erroneously; however, it would not follow if they had no jurisdiction in the first place.

The curious thing is that the statute requires that the petition for

⁵⁶ Hall v. Siegrist, Recorder, 13 Ohio Dec. (N.P.) 46 (Com. Pl. 1902).

⁵⁷ City of Lockland v. Shaver, 44 Ohio App. 189, 98 N.E. 2d 643 (Com. Pl. 1950).

⁵⁸ OHIO REV. CODE § 707.12.

⁵⁹ Craft v. Schaeffer, 34 Ohio L. Abs. 548 (1941); Hacker v. Payne, 7 Ohio App. 25, 27 Ohio C.A. 449, 29 Ohio C.D. 424 (1916); Ritter v. Falkenburg, 49 Ohio L. Bul. 277 (Com. Pl. 1904).

⁶⁰ Blanchard v. Bissell, 11 Ohio St. 96 (1860).

injunction be dismissed if the judge finds that none of the bases of attack listed in Section 707.11 are present. We say "curious" for two reasons. In the first place, the Section 707.11 bases of attack are stated in the disjunctive; one may rely on any one or all of them as he thinks may be demonstrated. Section 707.13 consistently permits the court to hear evidence upon anything averred in the petition and then, inconsistently calls for dismissal of the petition if none of the several listed grounds of attack is found to exist. In the second place, the section opens a township trustee method proceeding to the same grounds of attack as a proceeding under the county commissioner method although under the primary statutory provisions, as we have seen, the township trustee method lacks the meagre substantive requirements of the commissioner method. For example, the court on judicial review may determine that the limits of the proposed municipality are unreasonably small or large although the township trustees had no discretion in the matter.

Section 707.28 sets forth the procedure for the "proper division," between the village and the township or townships from which it has been carved, of real and personal property of the township or townships and of funds for township purposes on hand or in process of collection. The division is made by the probate court of the county of situs of the village upon application of the village. The statute does not provide a standard to guide the probate judge; it does no more than require him to take the indebtedness of each township into account. This is not to require apportionment of township indebtedness.

A court of appeals has held that where there was no township indebtedness other than certain accounts and notes (presumably of a current character) the probate court was not in error in ruling that the only factor to consider in making a proper division was taxable values in the township and the village.⁶¹ On this basis, if the taxable values in the township were \$10,000,000 and in the village a like amount, the split would be fifty-fifty, as it were. Assuming the presence of a township funded debt of \$200,000, how would that factor be taken into account—by deducting the amount from total divisible assets before making a division? The statute does not tell us.

What property and funds are divisible? In the last-mentioned case it was decided that township funds, as follows, were divisible:

- a. Special assessment fund (the report does not show whether any of the property benefitted lay in the village or why it was not to be considered as dedicated to payment of the cost of the improvements for which they were levied. Surely debt service levies to provide for payment of bond principal and interest would not be subject to division).

⁶¹ *In re Village of Eastlake*, 88 Ohio App. 25, 96 N.E. 2d 435 (1950).

- b. Firemen's indemnity fund.
- c. Money received from liquor permits.
- d. Tax receipts for the five months after the village came into existence.
- e. Funds on hand or in process of collection arising out of the general levy.
- f. The general fund.
- g. Gasoline or liquid fuel fund.

How would the taxable values factor of allocation work as to township real estate where, for example, the only parcel was the township hall? Suppose the realty were situated in the village?

What of township contracts? Are they not property? Bilateral contracts involving township performance would complicate the problem. Loss of territory to a village might weaken the township's ability to perform. Is its situation to be aggravated by transferring an interest in the benefits of the contract to the village? Surely, the probate court could exact that the burden also be shared.

The statute provides that the findings and orders of the probate court shall be final. This does not preclude appellate review on questions of law in view of Section 6 of Article IV of the Ohio Constitution, which provides that the courts of appeals shall have jurisdiction, as may be provided by law, to review judgments on final orders of courts of record inferior to them.⁶²

In an old circuit court case Section 5 of Article XII of the Ohio Constitution had been interpreted to forbid the division of the proceeds of a township tax with a village unless there were a correlative village function to which the village share might still be applied in the village.⁶³ That section reads:

No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

It seems pretty clear that this provision is directed to state, not local levies. This was pointed out in the recent *Eastlake* case,⁶⁴ but the court relied, as well, upon the conclusion that the township funds in question were equally applicable to village purposes in any event.

The probate court had, in the *Eastlake* case, ordered the township to maintain the roads in the village throughout the year after incorporation. This went beyond its statutory authority as to division of property and funds. By the time the court of appeals so declared, the year had run (apparently without compliance by the township), and the court did not actually modify the judgment below in this respect.

⁶² *Id.*

⁶³ *Township of Northfield v. Village of Macedonia*, 21 Ohio C.C. (N.S.) 445 (1907).

⁶⁴ *Supra*, note 61.

The final act to bring the new municipality into operating status is election of officers.⁶⁵ This may be done at a special election held not later than six months after incorporation. The agent for the petitioners sets the date of this election. If a special election is not held, the initial election of officers of the municipality is the first general election after its creation.⁶⁶

There are similar validating provisions relating to irregular incorporation and annexation proceedings.⁶⁷ They will be treated together in this paper at the close of the discussion of annexation.

ANNEXATION IN GENERAL

In 1892 the Ohio Supreme Court decided that the General Assembly had power to detach territory from a municipality by special act.⁶⁸ The statute in question was considered local in nature and consistent with the constitutional ban on special legislation conferring corporate powers since it merely detached territory.⁶⁹ Annexation is another matter. It at least has the effect of making corporate powers available in new territory. The more compelling consideration today, as to both topics, is the Home Rule Amendment of 1912, which ordains that provision be made by general laws for the incorporation and government of municipalities.⁷⁰ We suggest that special legislation as to annexation or detachment would be out of harmony with the Home Rule Article.⁷¹ In a broad sense, annexation is an aspect of incorporation—it makes additional people a part of the body of inhabitants constituting the corporation. Conversely, detachment would usually reduce the members of the corporate body. Both annexation and detachment, moreover, affect municipal government directly, in terms of jurisdiction but not of structure and general powers and procedures.

⁶⁵ OHIO REV. CODE § 707.21.

⁶⁶ OHIO REV. CODE § 707.27 through 707.26 relate to proceedings involving territory situated in more than one county, jurisdiction of municipal officers and proceedings to change municipal names.

⁶⁷ OHIO REV. CODE § 707.27 and 709.21.

⁶⁸ *Metcalf, Auditor v. State*, 49 Ohio St. 586, 31 N.E. 1076 (1892).

⁶⁹ Ohio Constitution, Article XIII, Section 1, forbids the enactment of any "special act conferring corporate powers."

⁷⁰ Ohio Constitution, Article XVIII, Section 2, provides, in part, that "General laws shall be passed to provide for the incorporation and government of cities and villages . . ."

⁷¹ In *Schultz v. City of Upper Arlington*, 88 Ohio App. 281, 97 N.E. 2d 218 (1950), annexation was classified as a matter of a "general nature" as distinguished from a home rule subject. It will be remembered that Section 26 of Article II of the Ohio Constitution requires that all laws of a "general nature" shall have a uniform operation throughout the state. This point is noted in passing. The basic proposition here is that the Home Rule Amendment outlaws special legislation as to municipalities.

Is annexation a home rule matter? The Supreme Court of Missouri recently decided that the constitutional grant of authority to a city to amend a home-rule charter was broad enough to enable the city to annex territory lying just across a navigable river in the next county without benefit of enabling legislation.⁷² The court characterized the power as necessary to the objects and very existence of the municipality.

A recent Ohio appellate court decision affords a strong contrast. As will appear more fully later the Ohio annexation statute requires that annexation initiated by freeholders residing in an area proposed to be annexed be accepted by the governing body of the municipality. The home rule charter of the City of Upper Arlington rendered such an annexation subject to compulsory referendum. The court refused to give effect to the charter provision. Annexation was treated as a subject of a general nature, state-wide in scope and, thus, not within the constitutional grant to municipalities of all powers of local self-government. The statute, accordingly, controlled. The charter provision was set aside as in conflict with the statute.⁷³

Certainly a rational argument can be made to sustain the conclusion that the power of annexation is not a home rule power. It involves people, territory, and interests beyond the limits of a municipality. Policy considerations affect the state and the larger local community as well as the municipality. This is far from saying, however, that a municipality is not even free to provide, by home rule charter, who shall speak for it in accepting annexations initiated by outside folks. Is that not an internal arrangement which does not affect the basic policy of the statute?

Provision for annexation, in reality, is an extension of the power of incorporation. Statutes relating to the general subject of incorporation of villages and of annexation of territory to villages already created are, the Ohio Supreme Court has declared, to be treated as one for purposes of construction and interpretation.⁷⁴

Two modes of annexation are authorized by the Ohio Revised Code. They are: (1) annexation on application of adult freeholders residing on territory adjacent to a municipality;⁷⁵ and (2) annexation on application of a municipal corporation.⁷⁶ A related subject, consolidation and merger of municipalities, ⁷⁷ is not within the scope

⁷² State *ex inf.* Taylor, Atty. Gen., *ex rel.* Kansas City v. North Kansas City, 360 Mo. 374, 228 S.W. 2d 762 (1950).

⁷³ Schultz v. City of Upper Arlington, *supra*, note 71. *Accord:* City of Cincinnati v. Rosi, 92 Ohio App. 8, 109 N.E. 2d 290 (1952).

⁷⁴ Shugars, Clerk v. Williams, 50 Ohio St. 297, N.E. 248 (1893).

⁷⁵ OHIO REV. CODE § 709.02 *et seq.*

⁷⁶ OHIO REV. CODE § 709.13 *et seq.*

⁷⁷ OHIO REV. CODE § 709.22 *et seq.*

of this paper. The two modes of annexation have several elements in common and because of this will be treated insofar as possible, together.

I. ANNEXATION ON APPLICATION OF FREEHOLDERS

The inhabitants residing on territory adjacent⁷⁸ to a municipality may, by petition to the county commissioners,⁷⁹ apply for annexation to the municipality. The petition must be "signed by a majority of the adult freeholders residing on such territory, and shall contain the name of a person authorized to act as the agent of the petitioners . . . and a full description of the territory, and be accompanied by an accurate map⁸⁰ or plat thereof." The petition must be presented at a regular session of the commissioners, and when presented the same proceedings must be had "as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village. . . ."⁸¹

The territory to be annexed must be adjacent to the municipality.⁸² Any other substantive limitation upon the commissioners must come from the statutes pertaining to incorporation, which, by Section 709.03 are made a part of this annexation procedure "as far as applicable." Does this reference incorporate Section 707.07, which gives the commissioners discretion to determine if the territory is unreasonably large or small and if it seems right that annexation (incorporation) be granted? The commissioners are required by Section 709.03 to perform the "same duties" with respect to annexation proceedings as they do with respect to incorporation proceedings. This clause appears to authorize their use of discretion, and, in fact, would appear to be of little force in the statute if construed otherwise because directly preceding the clause it is stated the same "proceedings" shall be had as far as applicable as in applications for incorporation. It may be suggested that one clause relates to procedure and the

⁷⁸ Does the word "adjacent" mean the same here as in § 707.04? It was said in *Hall v. Siegest*, Recorder, 13 Ohio Dec. (N.P.) 46 (Com. Pl. 1902), that the unplotted land covered in an application for incorporation must have some community of interest with the plotted area. As a matter of policy and in the larger sense of "community," this should be so as to annexation.

⁷⁹ Suppose, as is not uncommon in these days of rapid urban growth there are competing efforts to incorporate an area and to annex it to a municipality. The prevailing view in other states is that the first proceeding initiated has priority. See *Town of Greenfield v. City of Milwaukee*, 259 Wis. 77, 47 N.W. 2d 292 (1951). There is some suggestion in Ohio that the time of filing with the cognizant public body should control. See *City of Cincinnati v. Rosi*, *supra*, note 73; *State of Ohio ex rel. Chisholm v. McKenzie*, 16 Ohio C.C. (N.S.) 172 (1906).

⁸⁰ As to the accuracy of the map, see note 19, *supra*.

⁸¹ OHIO REV. CODE § 709.03.

⁸² Territory on the opposite bank of a navigable river is "contiguous." *Blanchard v. Bissell*, 11 Ohio St. 96 (1860).

other to substantive discretion in the commissioners. This very point has never been isolated in a court decision; however, an early Supreme Court case appears to assume the substantive power in the commissioners.⁸³

Although the substantive discretion of the commissioners under Section 707.07 is carried over by Section 709.03, it does not follow that jurisdictional limitations of Section 707.02 are also incorporated. In fact, it appears they are not as they are neither a "proceeding (s)" nor "duties" with respect to "proceedings" as those terms are used in Section 709.03. Therefore, the territory to be annexed need not be platted; nor is it material that it includes a county or village infirmary.⁸⁴

The provisions governing qualifications of petitioners vary materially from those under the head of incorporation. Incorporators must be resident electors. A petitioner for annexation must be an inhabitant of the area to be annexed and be an adult freeholder. Thus, a county cannot institute proceedings as it can hardly be said to be a "freeholder," or to "reside" in the area to be annexed.⁸⁵ It is also difficult to make out a private corporation as a qualified petitioner under Section 709.02. A corporation may be a resident or an inhabitant for purposes of a particular statute, but it is difficult to perceive how it can be an "adult freeholder." The Attorney General has ruled that a private corporation was qualified under Section 709.02.⁸⁶ The economic interest of the corporation may be very great, but if it is to be recognized by the statute we would expect to find some better terminology than "adult" or "freeholder." "Adult" denotes a natural person of legal age; a "freeholder" includes the holder of a life estate, which is something that a corporation cannot be.⁸⁷

A petition must contain an accurate description of the territory and the name of a person to act as agent for the petitioners. More than one agent may be named. The other elements to be included in a petition for incorporation are not applicable.⁸⁸

It will be recalled that Section 707.05 provides that the commissioners are to cause a petition for incorporation to be filed in the county auditor's office for sixty days and to fix a date for hearing

⁸³ *Hulbert v. Mason*, 29 Ohio St. 562 (1876). See also 1931 Ops. Atty. Gen. (Ohio) No. 3836. The *Hulbert* case was overruled, on other grounds, by *Geauga Improvement Ass'n v. Lozier*, 125 Ohio St. 565, 182 N.E. 489 (1925).

⁸⁴ 1946 Ops. Atty. Gen. (Ohio) No. 1335.

⁸⁵ 1946 Ops. Atty. Gen. (Ohio) No. 1399.

⁸⁶ 1950 Ops. Atty. Gen. (Ohio) No. 1784.

⁸⁷ The attorney general took the position that "adult" was used simply to exclude minors for their own interests. The language, however, is positive and adult could hardly refer to other than individuals.

⁸⁸ Such as the name proposed for a municipal corporation.

which must be more than sixty days after the filing. The agent of the petitioners must publish a notice of the petition.

It would appear that Section 707.05 is completely applicable to annexation proceedings but the court, in *Pollock v. Toland*, held that the part of the "section which states that the petition shall be filed with the county auditor, simply provides for a safe and proper place for its deposit . . ." and is inapplicable.⁸⁹ This is a strained, if not a wholly unwarranted, construction of plain and unambiguous language. It is hardly to be considered authoritative in view of an earlier case in which the Supreme Court decided that notice must be posted for six consecutive weeks in the area to be annexed.⁹⁰

Section 707.06 requires that the hearing be public, that interested parties may appear and contest the granting of the prayer of the petition, and that the petition may be amended.⁹¹ In *Shugars, Clerk v. Williams*,⁹² the Supreme Court declared, in effect, that the incorporation and the annexation sections are in *pari materia*; it was determined that the power to amend conferred by Section 707.06 is available in annexation proceedings. It appears that Section 707.06 is applicable in its entirety.

Sections 707.08, 707.09, and 707.10 are inconsistent with Section 709.03 and are inapplicable in this context. These sections relate to procedural steps to be taken after the commissioners have ordered incorporation. Those steps include the making of journal entries, the filing of the papers in the proceeding, and subsequent action by the county with the county recorder. The last sentence of Section 709.03 requires that annexation papers be deposited with the city auditor or clerk.⁹³

"At the next regular session of the council of the municipality, after the expiration of sixty days from the date of such filing, the auditor or clerk shall lay the transcript and the accompanying map or plat and petition before the council. Thereupon, the council, by resolution or ordinance, shall accept or reject the application for annexation."⁹⁴

In *Decker v. City of Toledo*,⁹⁵ the city council of Toledo had delayed action on an annexation petition for two years and eight months. The court held the city council had not lost its jurisdiction.

⁸⁹ 1 Ohio C.C. (N.S.) 315, 15 Ohio Cir. Dec. 75 (1903).

⁹⁰ *Franklin v. Croll*, 31 Ohio St. 647 (1877).

⁹¹ Concerning amendment and an agent's authority with respect thereto, see text above note 26, *supra*.

⁹² Note 74, *supra*.

⁹³ "The final transcript of the board and the accompanying map or plot and petition shall be deposited with the auditor or clerk of the municipal corporation to which annexation is proposed to be made, who shall file such records in his office."

⁹⁴ OHIO REV. CODE § 709.04.

⁹⁵ 56 Ohio App. 344, 10 N.E. 2d 955 (1937).

The word "thereupon" was taken to mean simply "thereafter" and not "immediately." It may be granted that council is not bound to act without a moment's delay, but this is not to say that time available is not limited by considerations of reasonableness. In two years and eight months, under present-day conditions, an area could so change that it would be very different from the one presented in the petition to the county commissioners. This might be particularly prejudicial to the interests of new inhabitants of the territory.

Section 709.05 reads: "If the resolution or ordinance rejects the application, no further proceedings shall be had, but such rejection shall not be a bar to application thereafter to the county commissioners on the same subject." If an application is allowed the next step is the completing and filing of records of the proceedings.⁹⁶

In the *Decker* case, an "annexation" ordinance had originally been voted down in council. A new council was elected; a motion to reconsider was adopted, and annexation was approved. The court concluded that the original vote did not bar "further proceedings" because the statute reads "reject" and there was no rejection here but only a failure to accept annexation. Even if it were a rejection the court declared the council retained jurisdiction through the motion to reconsider and "such legislative action is not fully disposed of until a vote to reconsider has been defeated, or the time for making such motion has passed." It is true that council action is not final until the period for reconsideration under council rules has expired, but the suggestion that the form of the ordinance—affirmative or negative—is controlling lacks substance.

II. ANNEXATION ON APPLICATION OF MUNICIPALITY

Annexation on application of a municipal corporation is also instituted by a petition to the county commissioners. The council of the municipality must pass an ordinance directing the solicitor of the municipality, or some one to be named in the ordinance, to prosecute the necessary proceedings. Only "contiguous territory" may be annexed. The other method, it will be recalled, applies to "adjacent" territory. It is not believed that a difference in meaning was intended. "Like proceedings shall be had in all respects, so far as applicable," as are required under the freeholder method.⁹⁷ This section incor-

⁹⁶ The "further proceedings" referred to here are the filing by the municipal clerk of two certified transcripts of the annexation proceedings, one with the county recorder and one with the secretary of state. OHIO REV. CODE § 709.06; *Bach v. Goff*, 24 Ohio C.C. (N.S.) 561, 34 Ohio Cir. Dec. 766 (1904); *aff'd* without opinion, 70 Ohio St. 508, 72 N.E. 1154 (1904).

⁹⁷ OHIO REV. CODE § 709.15.

porates the substantive and procedural elements of the code sections which relate to annexation on application of freeholders which, in turn, incorporate the substantive and procedural elements of the code sections which relate to incorporation of villages.⁹⁸ A municipality doubtless may annex contiguous unplatted lands and also lands which include a county or village infirmary.⁹⁹ This latter conclusion is supported by the provisions of Section 709.17, which specifically disenfranchise, for this particular vote, electors who are inmates or resident employees of a county institution that is located in an area sought to be annexed.

When annexation is instituted by a municipality the applicant need not appoint an agent as is required in the freeholder method.¹⁰⁰ The statute does ordain, as we have seen, that the council in the ordinance authorizing the annexation, direct the municipal solicitor or someone else named in the ordinance to prosecute the proceedings necessary to effect annexation. The procedure of the freeholder method is not "applicable" in this context.

The most pronounced difference between the two modes of annexation is provided in Section 709.17 which requires an election to be held in the "area sought to be annexed at the next general or primary election occurring more than thirty days after the ordinance which initiates the annexation proceedings is passed by the municipal council. All annexation proceedings are stayed until the result of the election is known. If the vote is against annexation no further proceedings shall be had . . . for five years." It should first be pointed out that the vote is by electors of the entire unincorporated area of the township and not the area to be annexed.

Prior to a statutory amendment of 1947 the election was confined to voters residing in the area proposed to be annexed. From the urban standpoint this is extremely backward legislation. Urban growth is vigorously outward and it is bad enough, from the municipal point of view, to be confronted with a power of veto in the electors of the area proposed to be annexed, let alone to face a possible veto by the voters of the full township. It is to be noted, however, that an adverse vote under this section is not a bar to annexation upon application of freeholders.¹⁰¹

The five-year limitation is difficult to justify under any circumstances, particularly when the rapidly changing character of districts adjacent to municipalities is considered. It is common knowledge that the complexion of an area can be changed from open country to shopping center in much less than five years. Further, the residents

⁹⁸ See OHIO REV. CODE §§ 709.15 and 709.03.

⁹⁹ 1946 Ops. Atty. Gen. (Ohio) No. 1335.

¹⁰⁰ *Pollock v. Toland*, 1 Ohio C.C. (N.S.) 315 (1903).

¹⁰¹ 1949 Ops. Atty. Gen. (Ohio) No. 745.

of the unincorporated area of the township not to be annexed are not without recourse. They may seek judicial review to determine if the annexation is right, just, and equitable.¹⁰²

The requirement of an election when a municipality institutes annexation proceedings was added in 1945. Prior to this an area could be annexed against the wishes of its inhabitants.¹⁰³ An interesting question which has never been decided is this: Did the addition of this election section take away the discretion of the commissioners in granting or denying the application for annexation? May they still determine if it is right that annexation be granted or that the area to be annexed is unreasonably small or large? One possible argument is that the election procedure replaces the discretion of the commissioners, and they, at the most, may only re-examine errors in procedure. This is particularly plausible if Section 709.17 is considered a special law which modifies the prior general laws in this particular aspect. Another obvious alternative is that the election is to amplify the wishes of the township and persons involved and only implements the final policy determination of the commissioners. No aid is received from case law.

Another, and perhaps the final, difference between the two methods of annexation arises after the election has been held and the county commissioners have approved the application for annexation. Under the freeholder method, if the proceedings are not enjoined, it is necessary, in order to complete annexation that the municipal council pass an ordinance accepting the application for annexation. Is this requirement "applicable" where the council instituted the proceedings? The Attorney General has expressed the opinion that it would be "useless and absurd" to require this in instances where the council was the initiating force which is not the situation in the freeholder method.¹⁰⁴ An opposite result was reached in one common pleas decision,¹⁰⁵ but the Attorney General's opinion appears more persuasive. Why have council reaffirm its desire for annexation?

A problem of some difficulty would be presented were a municipality, which is barred by an election from annexing an area, to institute proceedings to annex a larger territory embracing the original area. A related problem would arise if only part of the area formerly attempted to be annexed were made the subject of a later proceeding. If the change in area were superficial the second proceeding would

¹⁰² Hall v. Siegrist, *supra*, note 78.

¹⁰³ This is obvious from the language of the pre-1945 statutes. In an 1895 case it had been unsuccessfully urged that annexation without consent of those affected would be unconstitutional since it would involve taxation without consent for local objects already accomplished. *State ex rel. v. Cincinnati*, 52 Ohio St. 419, 40 N.E. 508 (1895).

¹⁰⁴ 1939 Ops. Atty. Gen. (Ohio) No. 1266.

¹⁰⁵ Shipbaugh v. Kimball, 7 Ohio N.P. (N.S.) 514, 19 Ohio Dec. (N.P.) 33 (Com. Pl. 1908).

be vulnerable. If there were a substantial difference in area and the case for annexation in the second proceeding were not the same on the merits it should not be considered barred unless we are going to say that the bar automatically controls as to any or all of the original area.

JUDICIAL REVIEW

Annexation, whether commenced upon application of a citizen or of a municipality, is subject to judicial review. This review is by suit against the municipal clerk or auditor to enjoin further proceedings.¹⁰⁶ In a backhanded way Section 709.07 allows judicial review, at the instance of "any interested person," in annexation proceedings on application of freeholders. The statutes relating to annexation upon application of a municipality are silent as to judicial review. On the merits, it is by no means clear that the injunction procedure is available. Section 709.16 simply provides that where a municipality takes the initiative like proceedings shall be had in all respects, "as far as applicable, as are required" in the other method of annexation. Judicial review is permissible under the other method but not required. In the cases it has simply been assumed that this form of judicial review was available.

Under the freeholder method, after the municipal council passes the resolution accepting annexation, the record of proceedings is forwarded to the auditor or clerk of the municipality. A petition for injunction may be filed within sixty days from this time. In instances where the municipality commences annexation, as has been pointed out, formal acceptance is not required. It would appear, then, that in such an instance, a petition for an injunction must be filed within sixty days from the time the county commissioners file the papers with the municipal auditor.¹⁰⁷ Sections 709.08 and 709.09 relate to the making of the record after an injunction suit.

Since Section 709.03 embraces by reference the procedure used in incorporation of villages, the same rules apply as to proper party plaintiff, filing of petitions, discretions of the court and appeal.

The policy with respect to judicial review is subject to the same criticism in this context as in incorporation proceedings.

WHEN ANNEXATION IS COMPLETE—APPORTIONMENT

In the case of annexation at the instance of freeholders, the territory is to be deemed a part of the municipality when the resolu-

¹⁰⁶ OHIO REV. CODE § 709.07.

¹⁰⁷ We do not have great confidence in this statement; the statutes do not give one enough help!

tion or ordinance accepting annexation has been adopted. This is the case even though, in a given situation, the clerk has not completed the record¹⁰⁸ or the municipal council has not, by ordinance, accepted the apportionment of debts and funds required by Section 709.12. There is no express provision on this point with respect to municipally initiated annexation. If judicial review is available, as has been assumed in the cases, the annexation could not be perfected until the expiration of the sixty-day period for filing an injunction proceeding or the final disposition of such a proceeding adversely to the plaintiff, as the case might be.

Section 709.12 provides for apportionment of township indebtedness and "unencumbered balance (s) on hand," by the county auditor. The apportionment "shall not be in effect until it is accepted by ordinance or resolution of the legislative authority of the annexing municipal corporation." The passage of such resolution or ordinance shall be necessary to the validity of the annexation.

It would appear that apportionment should be made at the date on which annexation becomes complete; otherwise, matters would be most awkward since everything would have to be pro-rated. So it would be, were apportionment to be made as of the date annexation proceedings were initiated.¹⁰⁹ The language of the statute lends some support to a contrary conclusion. It is to the effect that the auditor shall make the apportionment when annexation proceedings have been commenced. Conceivably, this was designed to facilitate final action. A strong countervailing consideration is that to say, in effect, that the county auditor may determine the apportionment date, is to give him a discretion affecting the substance of the apportionment, whereas it is pretty clear from the remaining language of the section that his function was intended to be ministerial.

Once the municipality accepts apportionment by ordinance, it is bound and cannot later ask for a reapportionment because of newly discovered matters.¹¹⁰

Debt must be apportioned if the area being annexed would not as a part of the municipality be subject to township debt service tax levies. The statute requires that the apportionment be made in the proportion of the total tax duplicate for the annexed area to the total tax duplicate for the unannexed portion of the township. In other words, if each such total were \$10,000,000 the proportion would be: one is to one! No doubt, what was contemplated was that the municipality

¹⁰⁸ OHIO REV. CODE § 709.10 provides that when the resolution or ordinance accepting annexation has been adopted by the legislative authority of a municipal corporation the affected area is "deemed a part of the municipal corporation."

¹⁰⁹ 1943 Ops. Atty. Gen. (Ohio) No. 6475. In *State ex rel. Ellis, City Solicitor v. Heuck, County Auditor*, 42 Ohio App. 367, 182 N.E. 141 (1932), the latter procedure was followed but the question was not at issue.

¹¹⁰ *State ex rel. Ellis, City Solicitor v. Heuck, County Auditor*, *supra*, note 109.

would assume a share of the township debt bearing the same ratio to the total "net indebtedness" of the township that the total tax duplicate for the annexed area bore to the total duplicate for the township as it stood with the annexed area included.

There is no definition of "net indebtedness." Perhaps the courts would indulge a look at the Uniform Bond Act for light on the subject. For purposes of that act net indebtedness is determined by deducting from the total of the par value of the outstanding bonds and votes of the local unit the amount held in sinking funds and other indebtedness retirement funds for their redemption. (Certain obligations such as bonds issued in anticipation of the collection of special assessments are excluded from gross debt for this purpose.)

The municipality is required to provide for debt service on that portion of township debt assumed by it. The municipality does not, however, deal directly with the holders or creditors but transmits funds to the proper township authorities for application. The statute does not expressly refer to interest on debt; it speaks of final redemption of the township debt, which smacks of principal.

It is required that any unencumbered balance on hand in any township fund, except a fund required by law for retirement of township indebtedness, shall be divided on the same basis as the burden of net indebtedness.

Unlike Section 707.28, which applies to incorporation, this apportionment section does not refer to taxes and other funds in process of collection. Thus, no division of them is indicated. Again, this section is silent as to township realty and tangible personal property. Accordingly, no division is called for.

One interesting question which seems to have received little judicial consideration, is what is the effect of annexation on contracts which relate to the annexed area and which were entered into by the township before annexation was complete. Annexation does not, of course, impair the obligations of contracts. Conceivably, contracts relating to the annexed area could be deemed to involve indebtedness within the meaning of the apportionment statute, but this would produce an inequitable result where all the services under the contract were rendered in the area to be annexed. In *State ex rel. Dayton Power & Light Co. v. Lutz*,¹¹¹ the township trustees had entered into a contract providing for lighting certain territory which was annexed to Dayton. The Court declared the land in such area was still liable for special assessments, as provided under the contract, even though no apportionment under Section 709.12 had been made. The result in this case is fair, but a better thought out apportionment statute might have prevented this litigation.

¹¹¹ 14 Ohio L. Abs. 130 (App. 1933).

EFFECT OF ANNEXATION

When annexation has been completed under either method the inhabitants of the annexed area "shall have all the rights and privileges of the inhabitants within the original limits" of the municipality.¹¹² Conversely, it doubtless follows that they have the same duties as the inhabitants of the municipality.

Apparently one of the "rights and privileges" gained by inhabitants of the area annexed is to vote in municipal elections, without first satisfying the general residence qualifications for an elector. This point has never been isolated in a case but has been assumed in judicial proceedings.¹¹³ The wording of the statutes includes this result, and there is no actual conflict with the general election laws as this is a special law which is an exception thereto.

By statute, territory annexed to a municipality becomes a part of the municipal school district; the title to school property in the territory is vested in the board of education of the municipality.¹¹⁴

When territory is annexed the municipality gains control over all highways and roads in the area;¹¹⁵ this is subject, however, to the existing grades.¹¹⁶ The municipality is amenable to liability under existing statutes.¹¹⁷ Any action for injury done to highways or roads must be prosecuted by the municipality and not by township trustees or county commissioners.¹¹⁸

The Code contains validating provisions with respect both to irregular incorporations and irregular annexation. They have not been authoritatively interpreted. The section as to incorporation reads:

"No error, irregularity, or defect in any proceeding for the creation of a municipal corporation shall render it invalid if the territory sought to be incorporated has been recognized as such municipal corporation, and if any tax levied upon it as such has been paid, or if it has been subjected to the authority of the municipal legislative authority without objection from its inhabitants."¹¹⁹

This applies to both methods of incorporation. It will be seen

¹¹² OHIO REV. CODE § 709.10.

¹¹³ *Bach v. Goff*, *supra*, note 96.

¹¹⁴ OHIO REV. CODE § 3311.06.

¹¹⁵ *Lawrence Railroad Company v. Commissioners*, 35 Ohio St. 1 (1878). By this is meant local control, subject to such state and federal control as may be exercised with respect to state and U.S. highways.

¹¹⁶ *City of Dayton v. Haines*, 12 Ohio App. 439 (1919).

¹¹⁷ As to claims arising after annexation. From that point the municipality has a statutory duty, under Section 723.01, to keep streets in repair.

¹¹⁸ *Lawrence Railroad Company v. Commissioners*, *supra*, note 115.

¹¹⁹ OHIO REV. CODE § 707.27.

that the first two conditions are stated in the conjunctive and the third in the disjunctive. The section relating to annexation applies only to annexation at the instance of a municipality.¹²⁰ It contains the same three conditions as the incorporation provision but expresses all of them in the conjunctive. It would be of some interest to engage in interpretive speculations about recognition of a municipality, and so on, but we shall forebear.

There is a very badly worded old statute which permitted annexation of part, and doubtless all, of a village to an adjoining city. It was so unhappily drawn that its meaning was difficult to determine. The revisers have changed its language in an effort to make it reasonably clear. Their revision of the principal section is reproduced below.¹²¹ As it now reads, it plainly permits annexation to a city only of a part (not all) of an adjoining village. Action is initiated by (a) application of the legislative authority of the city and (b) written request of a majority of the voters of the territory of the village or of two-thirds of the resident voters of any part of the territory of the village. Presumably this reference to "any part" is to the particular part proposed to be annexed. The statute formerly authorized the county commissioners to cause the "alteration" to be made responsive to the application and required the commissioners to proceed in accordance with the general annexation statutes "as far as applicable." The revision omits the quoted phrase. This does not expressly take into account the existence of two methods of annexation of unincorporated territory, but it does not appear that there are differences which are significant for present purposes.

The statute employs the same faulty formula for apportioning debt as the general annexation statute. "The apportionment shall be made in the proportion of the total tax duplicate for the annexed territory transferred to the city to the total tax duplicate remaining in and for the unannexed portion of the village." In other words if half of the village, in terms of taxable values, were taken, the proportion would be one is to one!

The home rule aspects of this statute have already been considered.

¹²⁰ OHIO REV. CODE § 709.21 makes this clear by reference to section numbers.

¹²¹ OHIO REV. CODE § 709.35: When a city and a village adjoin each other, and the inhabitants of territory constituting any part of such village desire to be annexed to such adjoining city, on application of the legislative authority of the city and on written request of a majority of the voters of the territory of such village, or, on the written request of two thirds of the resident voters of any part of the territory of such village, the board of county commissioners may cause such alteration to be made, and the boundaries of the city and the village, respectfully, to be established in accordance with [sic] the application and request, and such territory thereafter shall constitute part of the city. In all such proceedings, the board shall be governed by sections 709.02 to 709.21, inclusive, of the Revised Code.

In 1938 provision was made by statute for the adjustment of the boundaries of adjoining municipalities by mutual consent.¹²² The legislative authorities of two adjoining municipalities may agree by reciprocal ordinances to a change in "the boundary line separating" them, but such action may not effect transfer of territory inhabited by more than five voters. The ordinances are certified to the county commissioners and that board must proceed by resolution to approve the change and to make such adjustment of funds, unpaid taxes, claims, and other fiscal matters as it determines to be proper.

DETACHMENT (DISANNEXATION)

Prior to the adoption of the Home Rule Amendment in 1912 it was determined that detachment of municipal territory was a local concern and, thus, not within the requirement that laws of a general nature have uniform operation throughout the state.¹²³ Whatever the merits of that decision, it is clear enough to the writers that the Home Rule Amendment contemplates that there be no more special legislation as to municipalities.¹²⁴

If annexation and detachment are on a common footing, so far as state-local relations are concerned, detachment is no longer to be considered a local affair. If they are not on common ground, we might wind up by placing detachment in the home rule category.

To the extent that the ground for detachment is that an area has never been or at least is not now suitable for urbanization, it is difficult, rationally, to say that the decision is necessarily for the municipality to make. It can be urged with some conviction, however, that cutting off municipal territory on any other ground without municipal consent would impair the integrity of the municipality as a home rule unit. This contention has been rejected by the Court of Appeals for Cuyahoga County in a case involving annexation of part of a village to a contiguous city under a pre-home rule statute.¹²⁵

The statutes authorize three different methods of detachment. They are: (1) petition addressed to county commissioners; (2) detachment by election; and (3) petition to common pleas court.

PETITION ADDRESSED TO COUNTY COMMISSIONERS

A majority of the freehold electors¹²⁶ owning lands in "any

¹²² OHIO REV. CODE § 709.37.

¹²³ Metcalf, Auditor v. State, 49 Ohio St. 586, 31 N.E. 1076 (1892).

¹²⁴ See text above note 70, *supra*.

¹²⁵ See note 6, *supra*.

¹²⁶ OHIO REV. CODE § 709.38. A petition of "freehold electors" owning land in the area is required. If there are none, as where corporations own all the land, the requirement cannot be met. See 1928 Ops. Atty. Gen. (Ohio) No. 3061.

portion" of the territory of a municipality may petition the county commissioners for the detachment of that portion from the municipality, and the commissioners, with the assent of the council of the municipality given by ordinance, shall detach the portion from the municipality and attach it to any contiguous township, or if requested in the petition, shall erect the territory into a new township. Since it is not required that the specified area be on the municipal periphery, it would be possible, under the language of the statute, to carve a new township out of the heart of a municipality. Apportionment of indebtedness and monies and credits of the municipality is required. ". . . after such apportionment is made each section of the original territory by which the indebtedness was incurred shall be primarily liable for the portion of the indebtedness so apportioned. . . ." Nothing is said concerning municipal property. What of municipal facilities situated in the area detached? Does location control?

The county commissioners have no discretion under this statute. Given the proper factors they must grant detachment. There is one limitation on their jurisdiction. Where no new township is to be formed there must be a contiguous township to which the area may be attached. If, as we interpret the statute, the action of the petitioners controls, subject to the assent of the municipal legislative body, is not the decision of the public question placed in private hands?

DETACHMENT BY ELECTION

The inhabitants residing in any portion of a village (not a city), "such portion being contiguous to an adjoining township," and being not less than 1500 acres in extent, may request an election upon the question of detachment by filing with the board of elections a petition which contains "signatures equal in number to fifteen per cent of the total number of votes cast at the last general election in such territory."¹²⁷ The petition must contain (a) an accurate description of the affected area, (b) an accurate plat or map of the area, (c) if the creation of a new township is sought, the name proposed for it, and (d) the name of a person to act as agent for the petitioners. Within ten days after the petition is filed the board of elections "shall" determine if it conforms to the requirements of the statute. If it does the board shall order an election to be held in not less than ten or more than twenty days thereafter.¹²⁸ If a majority of the votes are against detachment, further proceedings are barred for two years. If the majority favor detachment the result, the original petition, and plat and a transcript of all the proceedings of the board must be certified by it

¹²⁷ OHIO REV. CODE § 709.39.

¹²⁸ Here, again, we have provision for an election on very short notice.

to the county recorder who, in turn, must make a record of them and certify a transcript of the record to the Secretary of State. The detachment of territory "shall thereupon be complete."

Under this procedure consent of the village legislative body is not required. That squarely presents the home rule question previously mentioned.

The requirement that the affected area be "contiguous to an adjoining township" has not been taken literally. In a recent unreported decision of the Court of Appeals of Cuyahoga County¹²⁹ detachment was allowed even though the area to be detached comprised a large part of the township and the remainder of the township was within the limits of other municipalities with the effect that there was no unincorporated township territory at the outset.

Section 709.40 provides for apportionment of the property, funds and indebtedness of the village. It must be made upon the basis of the "respective tax duplicates" of the village and detached territory. No definite apportionment formula is prescribed. Water pipes and sewers are to be considered as property, within the meaning of this section, to the extent that they have been paid for from the general funds of the village. If the village authorities and public authorities "in control of" the detached territory are unable to agree upon an apportionment it must be made by the probate court upon application either of the authorities of the village or those of the "detached territory." Unless set up as a new township that territory would not have governing authorities as such but would, of course, be under jurisdiction of a pre-existing township.

PETITION TO COURT OF COMMON PLEAS

The owner of unplatted farm lands, annexed to a municipality after its incorporation, may petition the court of common pleas of the county of situs for detachment at any time after the lands have been annexed for five years.¹³⁰ The proceeding is an adversary contest between the owner as plaintiff, and the municipality as defendant. If the court finds the lands are farmlands and not within the original corporate limits of the municipality, that the taxes thereon for municipal purposes are in substantial excess of the benefits conferred by reason of being within the municipality, and that the lands may be detached "without materially affecting the best interests or good government" of the municipality or the territory therein adjacent to the territory sought to be detached, an order and decree may be made

¹²⁹ *Burroughs v. Wasserman*; motion to certify denied by Supreme Court (case no. 32869, Jan. 16, 1952).

¹³⁰ OHIO REV. CODE § 709.41.

by the court that the lands be detached from the municipality and attached to the most convenient adjacent township in the same county.

These sections have been declared constitutional.¹³¹ The objection that they involve delegation of legislative power to the judiciary has not prevailed.

There is no provision for apportionment of debt and funds. Would not this ground the conclusion that there would be none? The area detached would, doubtless, not be subject to municipal debt service levies for bonds issued between annexation and detachment, since the possibility of detachment existed from the outset.

CONCLUSION

Through the efforts of the Bureau of Code Revision and cooperating organizations and individuals the State of Ohio has been able to take a tremendous stride forward in the organization of its statute law. The Revised Code is a significant achievement. It is the basic stage in the needed process of continuous revision. The State may now, within the Revised Code framework, set about substantive revision, "in manageable bites," of the parts of the Code which call for re-examination at the policy level.

It is to be remembered that all Ohio municipalities, charter and non-charter, have substantive home rule powers under the Home Rule Amendment of 1912. In a series of decisions, the latest of which places urban redevelopment in the home rule category,¹³² the Ohio Supreme Court has made home rule much, much more meaningful. Yet, the so-called Municipal Code, which dates from 1902 and has much pre-1902 material in it, deals with municipal government and administration, for the most part, as though there were no home rule amendment. It is fraught with provisions on substantive matters within the sweep of home rule powers. This is basis enough for thorough re-examination of the municipal corporations title of the Revised Code.

We nominate for early study the existing legislation on municipal incorporation and territorial changes. It is hopelessly outmoded and it never had much policy content. The problems of urban life are too difficult, too important, too pressing for the State to suffer the continuance of this condition of its statute law.

¹³¹ *The Incorporated Village of Fairview v. Giffey*, 73 Ohio St. 183, 76 N.E. 865 (1905).

¹³² *State ex rel. Bruestle, City Solicitor v. Rich, Mayor*, 159 Ohio St. 13 (1953).